BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBI WILKERSON Claimant	)	
VS.	)	Docket No. 1,028,003
STATE OF KANSAS Self-Insured Respondent	)	

ORDER

Respondent requested review of the October 13, 2010 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on January 21, 2011. Thomas D. Arnhold, of Hutchinson, Kansas, was appointed by the Acting Director as a Pro Tem in this matter.[1]

APPEARANCES

George H. Pearson, of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument respondent confirmed that timely notice was not an issue for this appeal.[2] In addition, the parties agreed that as of December 30, 2006, the fringe benefits were discontinued. Thus, claimant's average weekly wage would increase to the stipulated rate of $636.81 as of that date.

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[1] This appointment was made in light of the retirement of Board Member Carol Foreman.

[2] Respondent's Notice for Appeal, filed on Oct. 20, 2010, originally listed timely notice as an issue.

ISSUES

The ALJ concluded claimant suffered a compensable injury and as a result, sustained a permanent partial functional impairment of 45 percent to the right shoulder and 50 percent to the right knee as a result of her February 25, 2006 accident.[3] The ALJ went on to conclude that, pursuant to K.S.A. 44-510c, claimant was permanently and totally disabled as of December 30, 2006, the date respondent terminated claimant's employment.

Respondent has appealed this decision and alleges the Award should be reversed in its totality. Respondent contends claimant's credibility (as well as that of her husband) is so lacking that the ALJ erred in finding claimant sustained a compensable accident. Simply put, respondent believes this "accident" is nothing more than a fabrication. In the event that the existence of her accident is accepted, respondent argues that claimant's impairment is limited to her shoulder as respondent believes the evidence does not support that an injury occurred to claimant's knee as a result of the accident. Respondent goes on to suggest that "[e]ven if the claimant has two scheduled injuries she is not entitled to an award of permanent total disability" because the plain language of K.S.A. 44-510c requires a total and complete *loss of* two or more of the members listed in the statute, and not merely a *loss of use of* those members.[4]

In addition, respondent argues that claimant has failed to make a good faith effort in retaining and/or finding employment since she left her job with respondent in December 2006. Respondent believes that claimant was capable of working up until that time and on her own, claimant abandoned her job, forcing respondent to terminate her. Thus, she is not "completely and permanently incapable of engaging in any substantial and gainful employment".[5] Respondent has also offered a job site analysis[6] in support of its contention that claimant remained capable of performing her job duties with respondent (and therefore is not entitled to permanent total disability benefits).

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[3] These impairment figures are based upon the opinions provided by Dr. Prostic.

[4] Respondent's Brief at 6 (filed Nov. 18, 2010). Respondent even goes on to suggest that "it is not permissible to mix and match body parts in order to create the presumption." *Id.*

[5] K.S.A. 44-510c(a)(2).

[6] Waggoner Depo., Vol. II (Sept. 22, 2010), Ex. 2.

Finally, respondent maintains that claimant is not entitled to any temporary total disability benefits (TTD) "beyond 2006"[7] as respondent purportedly provided accommodated work and claimant failed to appear.[8]

Claimant argues that the ALJ"s Award should be affirmed in all respects and her right to future medical should be left open.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a developmental disability technician and was assigned to assist the facility's clients with their activities of daily living, including personal care, feeding and tending to their needs. On Saturday, February 25, 2006, claimant was attempting to dress a client who required careful attention when she experienced what she described as an "electrical shock"[9] sensation through her right shoulder and down to her right knee. Claimant says she also noticed a knot in her right calf.[10] Claimant completed her duties with her client and then went to take some over-the-counter pain medication for her pain.

Claimant's recitation of what happened next is, admittedly, confusing. Claimant testified that she told her supervisor, Marjorie Wolf,[11] and was told to fill out an incident form, which she says she slid under her supervisor's door.[12] Ms. Wolf testified that she did not regularly work Saturdays. Nevertheless, by Monday, February 27, 2006, it is uncontroverted that Ms. Wolf was aware claimant had reported an injury while dressing this particular client, although she cannot remember how she learned this fact. Ms. Wolf did

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[7] R.H. Trans. at 5-6.

[8] Although respondent proffered a series of dates during which it contends it paid benefits, claimant's counsel questioned the accuracy of those payments. The parties later stipulated to the amount respondent paid but no further information was provided that would explain why respondent believed it was not obligated to pay the TTD that was tendered.

[9] Claimant's Evidentiary Depo. at 16.

[10] *Id.* at 25.

[11] P.H. Trans. at 18.

[12] It is somewhat unclear from this record whether this was under Ms. Wolf's office door or under Ms. Waggoner's door.

not witness this event, nor did she know anything more specific other than the fact that claimant claimed injury while dressing a particular client on the Saturday before.

After she completed her shift claimant then went home where her husband testified she arrived crying. The two of them proceeded to the emergency room (ER) at Stormont Vail, even though claimant knew this was not the provider used by her employer for workers compensation injuries. The ER record, from February 25, 2006, does not reference any work-related accident, nor does it reflect any physical complaints to the shoulder or the knee. Rather, these records solely focus on what the emergency room physician believed was a blood clot behind claimant's right knee and possible deep vein thrombosis (DVT). The ER physician ruled out a DVT and claimant was sent home and told not to work.

On Tuesday, February 28, 2006, claimant went to her own physician, Dr. George W. Wright and those records generally corroborate claimant's contention that she was experiencing physical complaints to her right shoulder and her right knee dating back a few days before this visit and had been evaluated at the local ER.[13] Dr. Wright noted that claimant had symptoms consistent with adhesive encapsulitis in her right shoulder and possible osteoarthritis in the right knee. These records contain no explicit reference to an injury while at work.

Both claimant and her husband testified that claimant received a cell phone call from Diane Waggoner, the personnel health director, who handles the workers compensation claims, while on the way home from Dr. Wright's office. According to both of them, Ms. Waggoner was advising claimant that the bills resulting from the February 25, 2006 ER visit would not be covered by workers compensation. Ms. Waggoner denies this conversation ever took place because she is adamant that the first she was aware of claimant's alleged injury was on March 1, 2006, when claimant came to her office to fill out an injury report. At that point, Ms. Waggoner referred claimant to St. Francis Hospital, the facility that routinely handles work-related injuries for respondent's employees.

It is important to note that before February 25, 2006, claimant had received an evaluation and treatment from Dr. Craig Vosburgh for complaints of pain in both her right shoulder and right knee. Claimant received injections in both areas, at various times, which purported to relieve her symptoms. Her last visit (before this accident) with Dr. Vosburgh was in January 2006 and at that point, claimant was apparently doing well, but still scheduled to return to see Dr. Vosburgh in March 2006. But the events of February 25, 2006 intervened.

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[13] Although these records show that claimant denies any specific injury, claimant says that when asked, she did, in fact, deny any *injury* to the client. Claimant seemed to view these questions as if focused on what happened to the client during this event, rather than on the fact that her physical movements might have caused her *injury by accident*.

Claimant was eventually referred to Dr. Vosburgh for evaluation and treatment. When conservative efforts did not relieve her symptoms, he performed a diagnostic arthroscopy with "findings of fairly advanced degenerative changes of the glenohumeral articulation and extensive synovitis." on April 25, 2006.[14] Claimant's knee complaints continued as well and on July 28, 2006 Dr. Vosburgh arthroscopically examined her knee, finding a lateral meniscus tear and a perimeniscal cyst.[15]

Claimant was evaluated by Dr. Charles Rhoades, at the ALJ's request, to determine her need for further treatment in connection with this injury. Dr. Rhoades reviewed claimant's earlier records and performed his own examination, and concluded that claimant had degenerative arthritis and possible avascular necrosis in her right shoulder as well as a post-surgical torn meniscus, from which she was doing well. He also diagnosed clinical depression and chronic pain syndrome.[16]

When asked to speak to the causation aspect of claimant's conditions, he opined:

> It is my opinion that the right knee torn lateral meniscus is related to the lifting incident of February 25, 2006. The history is consistent with that injury.
>
> . . .
>
> It is my opinion that the shoulder degenerative arthritis and avascular necrosis are not related to the work-related accident - the patient had had over a year of pain previous to that incident. It is almost inconceivable that the trama from a straight lift in the position in which the patient demonstrated would cause that kind of injury to the shoulder.
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> It is my opinion that the right shoulder arthroscopy was indicated and related to the work injury. There was a traction injury and the fraying and injury to the biceps tendon, which was noted, and is consistent with that injury - the current severe pain and degenerative changes of avascular necrosis are not related to the work-related accident of February 25, 2006.[17]

In a follow-up report, he further elaborated on his opinions:

> It is my opinion, due to a reasonable degree of medical certainty, that the avascular necrosis is not a work-related problem. It is also my opinion that the accident could

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[14] P.H. Trans., Cl. Ex. 5 at 2 (Dr. Rhoades' Feb. 21, 2007 IME report).

[15] *Id.*, Cl. Ex. 5 at 3 (Dr. Rhoades' report at 2).

[16] *Id.*, Cl. Ex. 5 at 4 (Dr. Rhoades' report at 3).

[17] *Id.*

> have aggravated the arthritis and joint pain associated with the pre-existing avascular necrosis. It is impossible to quantify when the shoulder would have become painful from the avascular necrosis and subsequent injury to the overlying joint cartilage. However, it is almost certain that she would have eventually had moderately severe joint pain with that level of avascular necrosis.[18]

On December 11, 2007, claimant underwent a shoulder replacement procedure under the direction of Dr. Bruce Toby. Post-operatively, claimant had trouble with keloid development and required additional steroid injections. In addition, her knee complaints continued but no further treatment was requested or provided.

In addition to her physical complaints, claimant expressed psychological complaints which she associated with her injury. And while she apparently received treatment for those complaints, there is no psychological component at issue in this appeal.

Dr. Prostic saw claimant a number of times during the course of her claim and is the only physician who testified as to her ultimate impairment as a result of her alleged injury.[19] He consistently concluded that claimant injured both her right arm and right leg in the accident of February 25, 2006. His report states that:

> It continues to be my opinion that on or about February 25, 2006, Bobbi J. Wilkerson sustained injuries to her right arm and right leg during the course of her employment. She has required shoulder hemiarthroplasty. She will require total knee replacement arthroplasty in the not very distant future. Her left leg symptoms are from a combination of sciatica and trochanteric bursitis, unrelated to the work injury. Permanent partial impairment is presently rated at 45% of the right upper extremity for implant arthroplasty, limited motion, and weakness and 50% of the right lower extremity for severe loss of joint space on x-ray. Patient is unable to return to gainful employment.[20]

Dr. Prostic imposed sedentary work limitations, with limited right hand reaching, never lifting more than 10 pounds to her waist level, no more than 5 pounds up to her shoulder and nothing above her shoulder.[21] And with that, it was Dr. Prostic's opinion that claimant was unable to return to gainful employment. That opinion is echoed by the testimony of Dick Santner, who said that, based upon Dr. Prostic's restrictions, he was unaware of any jobs she could perform in the Topeka labor market that existed within significant numbers such that shed would be realistically capable of re-employment.

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[18] *Id.*, Cl. Ex 5 at 1 (Dr. Rhoades' Mar. 21, 2007 letter).

[19] Dr. Prostic Depo., Ex. 4 at 2 (Dr. Prostic's Apr. 16, 2010 Supplementary Report).

[20] *Id.*

[21] *Id.* at 16-17.

When questioned about the connection between the accident and claimant's diagnosis in her right shoulder, Dr. Prostic conceded that claimant had been treated for adhesive capsulitis in her right shoulder just 5 weeks before the accident and that there was grade three and grade four chondromalacia as a result of arthritis.[22] But this earlier treatment had not included a diagnosis of a rotator cuff tear. It was his opinion that she had torn her rotator cuff in the accident.

During cross examination, Dr. Prostic was asked the purpose of the first arthroscopic surgery. Dr. Prostic advised it was for the painful limited motion of claimant's shoulder.[23] Further questioning was as follows:

> Q: [**MR. BENEDICT**] Okay. This lady eventually had shoulder replacement surgery, correct?
> A: Yes.
> Q: She was a candidate or was she a candidate for that before the alleged work accident?
> **MR. PEARSON**: Let me object to vague and ambiguous as to candidate.
> A: I don't believe so.
> **BY MR. BENEDICT**
> Q: Okay. Was that necessitated by degenerative joint condition?
> A: Yes.
> Q: Okay. Now, are you associating that degenerative joint condition with a work accident in 2006?
> A: My belief is that the work accident accelerated the condition in her shoulder.
> Q: Okay. Describe to me how it accelerated and how much.
> A: Well, the September 29, 2005 dictation, of Dr. Vosburgh of the shoulder is that the x-rays reveal mild degenerative change of the glenohumeral joint. So one would not do a shoulder arthroplasty for mild degenerative changes of the glenohumeral joint. One must have something much more impressive.
> Q: And that was in 2005?
> A: This is September 29, 2005.
> Q: And the shoulder surgery was in 2007?
> A: Yes.
> Q: And it is - it is the nature of the beast that degenerative joint disease is going to progressively worsen over time?
> A: Yes. But let me add another factor. **What she was actually operated for was avascular necrosis.**
> ...
> Q: Avascular necrosis is bone is dying?
> A: Yes.
> Q. And you believe that the pulling up on this patient's pants caused the bone to die?

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[22] *Id.* at 25.

[23] *Id.* at 27.

A. No.
Q: So is the need for the total - for the shoulder replacement unrelated to the work accident then? You're hesitating Doctor.
MR. PEARSON: No, he's not. He's thinking.
MR. BENEDICT: Oh, okay.
A: **The shoulder replacement arthroplasty was for a combination of adhesive capsulitis, osteoarthritis and avascular necrosis. So it is my opinion that the work accident that is reported aggravated the underlying osteoarthritis, and perhaps added to the rotator cuff tearing, and that that was the major reason that it is associated with the surgery that was eventually performed**.
MR. BENEDICT
Q: The avascular necrosis accelerated the need for surgery?
A: I believe so.[24] (emphasis added)

Later on his deposition, claimant's counsel posed the following question to Dr. Prostic, asking him to agree or disagree with Dr. Rhoades' causation conclusions:

Q: [**MR. PEARSON**] He [Dr. Rhoades] continues. The current severe pain and degenerative – degenerative changes of avascular necrosis [in the right shoulder] are not related to the work related accident of February 25, 2006. Do you agree with that? [with Dr. Rhoades' findings and conclusions]
A: Correct.
Q: So it's actually the traction injury fraying of the biceps tendon and rotator cuff tear that are related or aggravated by the February 25, 2006, accident but not the necrosis?
A: Correct.[25] (emphasis added)

But later on he was then asked:

BY MR. PEARSON:
Q. Would the -- if this lady -- did this lady have a preexisting osteoarthritis before the February 25, '06 accident?
A: I believe so.
Q: And we're talking about her right shoulder now.
A: Yes.
Q: And the accident of February 25, 2006 would have aggravated or accelerated that osteoarthritis?
A: Yes.
Q: So that would be another reason why the shoulder replacement surgery would have been to treat the February 25, 2006, accident residuals.

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[24] *Id.* at 34-37.

[25] *Id.* at 44.

A: Yes.[26]

Dr. Prostic was also questioned as to the mechanism of claimant's knee complaints. He conceded that given the claimant's recitation of the accident, he was not "strictly" able to explain how claimant might have come to injure her knee.[27] However, as noted by the ALJ, Dr. Rhoades has opined that claimant's knee injury is consistent with the type of movement she described at the moment claimant felt the shocking sensation in her right shoulder and knee.[28] But it is also important to note that claimant's medical records show that claimant had been experiencing problems with her knee, including pain, swelling and giving way, as far back as April of 2003.[29]

Claimant was terminated from her job with respondent on December 29, 2006 and has worked no where else since that date, nor has she looked for employment. She has received a total of $60,150.18 in TTD.[30] Although respondent contends that claimant was able to perform her accommodated job, claimant disputes this fact. In support of respondent's contention, respondent offered a job site analysis which, in respondent's view, shows that claimant's job duties did not exceed the restrictions imposed by Dr. Vosburgh. This report was offered into evidence at Diane Waggoner's deposiiton and according to claimant's counsel, was not disclosed prior to that deposition. Ms. Waggoner did not generate the report. It was merely requested as a means of refuting claimant's contention that she could not perform the job duties that were requested of her in light of her restrictions.

After considering the entire record, the ALJ concluded that claimant had established it was more probably true than not that she sustained an accidental injury arising out of and in the course of her employment with respondent on February 25, 2006. The ALJ adopted the only functional impairment ratings contained within the record, 45 percent to the right shoulder and 50 percent to the right knee. And because the combination of these two impairments met the rebuttable presumption set out in K.S.A. 44-510c, the ALJ then considered whether there was any evidence to rebut a finding that claimant was permanently and totally disabled. Finding none, he awarded claimant benefits, giving

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[26] *Id.* at 66-67.

[27] *Id.* at 30.

[28] P.H. Trans., Cl. Ex. 5 at 4 (Dr. Rhoades' Feb. 21, 2007 report at 3). Pursuant to the parties' stipulations, Dr. Rhoades (get spelling) report is contained within the evidentiary record.

[29] Prostic Depo. at 30.

[30] Following oral arguments, the parties submitted letters which indicated that TTD was paid from 3/3/2006 to 9/5/2006, then 4/20/2007 through 5/3/2008. There was a lump sum payment which encompassed 11/1/2008 to 1/13/2009 and 1/14/2009 to 2/18/2010, for a total sum of $60,150.18. Claimant does not contest this figure nor the dates TTD was paid.

respondent credit for the TTD previously paid and awarding her weekly benefits at a weekly rate of $424.43 until such time as the statutory maximum is met. The ALJ made no evidentiary findings with respect to the job site analysis.

Respondent first takes issue with the underlying compensability of claimant's claim. Simply put, respondent contends that claimant has fabricated her accident, as evidenced by all the inconsistencies referenced in its brief to the Board and at oral argument

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[31] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[32] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[33] The existence, nature and extent of the disability of an injured workman is a question of fact.[34] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[35] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[36]

Here, claimant testified that she suffered an accident while working for respondent on February 25, 2006. This accident caused her to take over-the-counter pain medication and she purportedly filled out an incident report which she says she ultimately gave to Ms. Wolf but was never produced. Ms. Wolf testified on two separate occasions that by Monday morning, the 27th, she knew that claimant was alleging she was injured on Saturday while helping a resident.

While the trier of fact cannot arbitrarily or capriciously refuse to consider the testimony of any witness, it is not obliged to accept and give effect to any evidence which in its honest opinion is unreliable, even if such evidence is uncontradicted.[37] Admittedly,

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[31] K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[32] K.S.A. 44-501(a).

[33] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[34] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[35] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[36] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[37] *Collins v. Merrick*, 202 Kan. 276, 448 P.2d 1 (1968).

Ms. Wolf and claimant's husband generally corroborate the claimant's assertion that she was injured and that she gave notice of her injury to her supervisor that same day. However, the medical records simply do not correspond with claimant's assertion that she was injured as she alleges and suffering from a significant degree of pain and discomfort, as claimant and her husband suggest.

Within a short time of arriving home, claimant presented herself at the ER, a facility that she knew respondent did not normally use. Those records do not corroborate the amount of distress her husband described. Those records do not reflect any complaints to the shoulder or the knee. The sole focus is a complaint of pain behind the knee, focused on a lump, which the physicians suspected might be DVT but ultimately ruled out. Within a few days she went to her own physician and while these records generally recite right shoulder and right knee complaints and reference the earlier ER visit, they do not recite a history of a work-related injury. This is somewhat understandable given the fact that before her February 25, 2006 accident, claimant had a significant history of right shoulder and right knee complaints which were treated with injections and other conservative treatment. Indeed, claimant was originally scheduled to return to see Dr. Vosburgh for those pre-injury complaints in early March 2006.

Simply put, it is difficult to reconcile claimant's vivid description of her injury which caused an immediate electrical shock, and caused her to arrive home in tears, with the presentation and description of complaints contained within the medical records. Admittedly, it is troubling that respondent's employee, Ms. Wolf, confirms the reporting of an accident occurring as claimant alleges. But neither Ms. Wolf, nor anyone else based upon this record, witnessed this event. Her testimony merely supports the conclusion that claimant *reported* a claim, not that one in fact, occurred.

Having reviewed the entire record, the majority of this Board concludes that claimant failed in her burden of proof of establishing that she sustained an accidental injury arising out of and in the course of her employment. And because she has failed to establish a necessary element of her claim, she is not entitled to the benefits she seeks. Thus, the ALJ's Award is hereby reversed and claimant is denied an Award against this respondent. The balance of respondent's arguments are moot and will not be addressed.

In light of the Board's findings, to the extent respondent has paid for benefits in connection this claim, those expenses should be reimbursed by the Kansas Workers Compensation Fund pursuant to 44-534a(b).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 13, 2010, is reversed and claimant is entitled to no award against this respondent.

IT IS SO ORDERED.

Dated this _____ day of February 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The Board generally gives some deference to the credibility findings of the ALJ, particularly where the ALJ had the opportunity to observe the witness testify in person. In this case, the ALJ had the opportunity to observe the claimant testify on two separate occasions, at the September 12, 2008 Preliminary Hearing and the July 15, 2010 Regular Hearing. The ALJ also witnessed the testimony of claimant's husband, Robert Wilkerson, at the Preliminary Hearing and again at the Regular Hearing. The ALJ apparently found their Preliminary Hearing testimony credible because based on that testimony he found claimant proved she suffered personal injury by accident that arose out of and in the course of the employment with respondent. That finding was affirmed by a Board Member on appeal. The record has grown considerably since that Preliminary Hearing but the testimony about how the accident occurred and when it was reported by claimant to respondent has not changed significantly. Claimant's description of the accident has been consistent. Her testimony is supported by the testimony of her husband and of her supervisor, Ms. Wolfe. Mr. Wilkerson testified that when claimant came home from work on Saturday, February 25, 2006 she was in pain and crying. Ms. Wolfe, who did not work on Saturday, testified that by Monday, February 27, 2006 she was aware claimant had reported an injury that had occurred while dressing the particular client. I would affirm the ALJ's findings that claimant has met her burden of proving she suffered personal injury by accident on February 25, 2006 that arose out of and in the course of her employment with

respondent. I would further affirm the ALJ's findings as to the nature and extent of claimant's disability.

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge